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No. 06-1322

In The
Supreme Court of the United States

FEDERAL EXPRESS CORPORATION,
*Petitioner,*

v.

PAUL HOLOWECKI, *et al.*,
*Respondents.*

On Writ of Certiorari To The
United States Court of Appeals
For the Second Circuit

# BRIEF *AMICI CURIAE* OF AARP, THE ASIAN AMERICAN JUSTICE CENTER, THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, THE NATIONAL WOMEN'S LAW CENTER AND PEOPLE FOR THE AMERICAN WAY FOUNDATION IN SUPPORT OF RESPONDENTS

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# BRIEF *AMICI CURIAE* OF AARP, THE ASIAN AMERICAN JUSTICE CENTER, THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, THE NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, THE NATIONAL WOMEN'S LAW CENTER AND PEOPLE FOR THE AMERICAN WAY FOUNDATION

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## INTEREST OF THE *AMICI*[1/]

AARP is a nonpartisan, nonprofit membership organization of people age 50 or older dedicated to addressing the needs and interests of older Americans. AARP supports the rights of older workers and strives to preserve the legal means to enforce them. Almost half of AARP's more than 39 million members are in the work force and are protected by the Age Discrimination in Employment Act (ADEA), Title VII, and various state laws. Vigorous enforcement of these and other work place civil rights laws is of paramount importance to AARP, its working members, and the millions of other workers of all ages who rely on them to deter and remedy illegal employment discrimination.

The Asian American Justice Center (AAJC) is a national non-profit, non-partisan organization whose mission is to advance the civil and human rights of Asian Americans. Collectively, AAJC and its Affiliates the Asian Law Caucus, the Asian Pacific American Legal Center of Southern California, and the Asian American Institute have over 50 years of experience in providing legal public policy, advocacy, and

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[1/] Pursuant to Sup. Ct. R. 37.6, *amici curiae* state that no counsel for a party has written this brief in whole or in part, and that no person or entity, other than *amici curiae*, their members, or their counsel, have made a monetary contribution to the preparation or submission of this brief. Pursuant to Sup. Ct. R. 37.3 (a), written consent to the filing of this brief has been obtained from counsel for Petitioner and Respondents, and the documents confirming consent have been submitted to the Clerk's office.

community education on discrimination issues. The question presented by this case is of great interest to AAJC because it implicates the availability of civil rights protections for Asian Americans in this country.

The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

The National Partnership for Women & Families is a non-profit, national advocacy organization founded in 1971 that promotes equal opportunity for women, quality health care, and policies that help women and men meet both work and family responsibilities. The National Partnership has devoted significant resources to combating sex, race, and other forms of invidious workplace discrimination and has filed numerous briefs *amicus curiae* in the U.S. Supreme Court and in the federal circuit courts of appeal to advance the opportunities of women and people of color in employment.

The National Women's Law Center ("NWLC") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity in the workplace by supporting the full enforcement of anti-discrimination laws, including Title VII of the Civil Rights Act of 1964 and other laws that protect employees. NWLC has prepared or participated in numerous *amicus* briefs filed with this Court in employment discrimination cases.

People For the American Way Foundation ("PFAWF") is a nonpartisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, PFAWF now has more than 1,000,000 members and activists nationwide. PFAWF has been actively involved in litigation and other efforts to combat discrimination, and is particularly concerned that Americans have access to the courts to enforce their right to a workplace free of unlawful discrimination. PFAWF joins this brief to help vindicate that important right.

*Amici* collectively represent or are otherwise concerned with the interests of constituents of the Equal Employment Opportunity Commission (EEOC or Commission): employees who file charges alleging that they have suffered employment discrimination, harassment, a denial of reasonable accommodation or retaliation in violation of federal law. *Amici* deny the very premise of petitioner's argument — that, despite filing a complaint in writing in compliance with the EEOC's regulations, an employee may forfeit the right to bring a civil action if the EEOC fails to carry out its statutory duty to notify the employer and attempt informal resolution. (Although this case arises under the ADEA, it also affects employees seeking to bring suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*) Because of the gross unfairness this would visit upon employees who cannot influence the EEOC's discharge of its own duties, *amici* urge enforcement of an EEOC regulation long in effect governing the contents of an ADEA "charge," 29 C.F.R. § 1626.6, to which deference is appropriate under *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and that makes clear respondent satisfied her charge-filing obligation.

## SUMMARY OF THE ARGUMENT

The petitioner suggests, in its "question presented," that an employee who timely complains of age discrimination in writing to the EEOC may lose her right to commence a civil

action if the Commission does not treat the form as a charge, by providing notice to the employer or attempting voluntary conciliation. Based on the petitioner's reasoning, even the submission of an undisputed charge, i.e., an EEOC Form 5, might not qualify as a "charge" depending on the response by the EEOC. To extinguish an employees' right to file suit because of the Commission's inactivity takes us back to the doorstep of *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). In that case, this Court unanimously invalidated a provision of the Illinois Fair Employment Practices Act that would have terminated an employment discrimination claim if the state administrative agency with jurisdiction failed to convene a fact-finding hearing within 120 days. The Court held that "the Due Process Clauses protect civil litigants who seek recourse in the courts," including "plaintiffs attempting to redress grievances." *Id.* at 429. Thus, *Logan* disapproved forfeiture of a claim of employment discrimination by government inaction.

Respondent Patricia Ann Kennedy finds herself in the same peril that the plaintiff in *Logan* faced 25 years ago. The ADEA provides that it is the EEOC's duty to serve notice of the employee's charge promptly on the employer and seek informal resolution under section 7(d), 29 U.S.C. § 626(d).[2/] Yet when the EEOC received Ms. Kennedy's detailed allegations of age bias — which met the regulatory requirements for an ADEA charge, 29 C.F.R. § 1626.6 — it failed to carry out its duty to docket her case and notify the employer, petitioner Federal Express Corporation ("FedEx"). FedEx seizes on this administrative default as a basis to avoid her (and ten other employees') claims.

To rely on the EEOC's failure to act on Ms. Kennedy's charge would make the employee warrantor for the

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[2/] Section 7(d) mandates that "[u]pon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice and informal methods of conciliation, conference, and persuasion."

Commission's errors. With 15,000 to 20,000 ADEA charges filed with the EEOC each year (and 60,000 to 65,000 charges under other statutes enforced by the Commission),[3] experience tells us that sometimes the Commission will fail to carry out its duties under section 7(d), just as the Illinois Fair Employment Practices Commission in *Logan* sometimes neglected to convene a timely hearing. But in FedEx's view, the EEOC's failure to process the charge voids respondents' claims *latae sententiae*, without the benefit of notice to or a hearing for the employee. Under *Logan*, this notion is unacceptable.

Ms. Kennedy's only duty was to file a charge, and her submission met the conditions of the relevant regulation. Claimants before the EEOC have no duty to exhaust administrative procedures. *Woodford v. Ngo*, 126 S. Ct. 2378, 2390-91 (2006). Congress placed no further duty on employees to serve notice of a charge on employers. Nor must employees be expected to prod the Commission into action. Because employees "possess[] no power" to compel the EEOC to carry out its duties, it would be "unfair and irrational to punish them for the Commission's failure to do so." *Logan*, 455 U.S. at 443-44 (Powell, J., concurring in the judgment).

For these reasons, as further elaborated below, FedEx's attempt to shift the burden of default onto the employee must fail. The Second Circuit's decision recognizing Ms. Kennedy's Intake Questionnaire and affidavit as an ADEA charge, and allowing her case to proceed, should therefore be affirmed.

## ARGUMENT

### I. BUREAUCRATIC FORFEITURE OF A PRIVATE CAUSE OF ACTION OFFENDS DUE PROCESS

An employer charged with employment discrimination should not escape liability just because the Commission

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[3] U.S. Equal Employment Opportunity Commission, Charge Statistics, FY 1996-2006, http://www.eeoc.gov/stats/charges.html (last visited Aug. 31, 2007).

blundered. *See People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926) (Cardozo, J.). In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), this Court held that an employee's claim under an anti-discrimination statute was a property right protected by the Due Process Clause of the Fourteenth Amendment, which may not be extinguished without notice and a right to be heard. So even if the Commission failed to act here, under *Logan* that omission cannot by itself terminate Ms. Kennedy's claim.

Laverne Logan filed a charge with the Illinois Fair Employment Practices Commission alleging disability discrimination. The charge triggered a 120-day period for the Commission to convene a fact-finding conference under ¶ 858(b),[4/] but "[a]pparently through inadvertence, the Commission's representative scheduled the conference for . . . five days *after* expiration of the statutory period." *Id.* at 426 (emphasis in original). The employer filed an original writ of prohibition in the state supreme court to bar the belated proceedings. The Illinois Supreme Court granted the relief, holding the 120-day period to be jurisdictional. *Id.* at 427. It found that the 120-day period comported with due process because it promoted "just and expeditious" resolution of disputes. *Id.*

This Court unanimously reversed. While the justices varied in their analyses of the constitutional issues, a majority agreed with the proposition that "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." *Id.* at 428. *See also Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 485 (1988) ("[l]ittle doubt remains that such an intangible interest [in a cause of action] is property protected by the Fourteenth Amendment"); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 311-15 (1950) (cause of action held to be a property right). *Logan* held that the employee's claim of

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[4/] The Illinois act provided that "[w]ithin 120 days of the proper filing of a charge, the Commission *shall* convene a fact finding conference . . ." *Id.* at 427.

discrimination under the Illinois Fair Employment Practices Act was a property right. *Logan*, 455 U.S. at 430-31. The Court also construed the rule dismissing unheard claims in 120 days as a "procedural limitation on the claimant's ability to assert his rights, rather than a substantive element of the FEPA claim." *Id.* at 433.

The Court also held that the employee's claim could not be extinguished "without first giving the putative owner an opportunity to present his claim of entitlement" *Id.* at 434. As the majority held:

> Logan's interests in retaining his employment, in disproving his employer's charges of incompetence or inability, and — more intangibly — in redressing an instance of alleged discrimination, are all substantial. At the same time, the deprivation here is final; Logan, unlike a claimant whose charge is dismissed on the merits for lack of evidence, cannot obtain judicial review of the Commission action. A system or procedure that deprives persons of their claims in a random manner, as is apparently true of ¶ 858(b), necessarily presents an unjustifiably high risk that meritorious claims will be terminated. And the State's interest in refusing Logan's procedural request is, on this record, insubstantial. [*Id.* at 434-35]

Justice Powell's concurring opinion sounded the same theme, while applying a rational-basis test: "[C]laimants with

identical claims, despite equal diligence in presenting them, would be treated differently, depending on whether the Commission itself neglected to convene a hearing within the prescribed time . . . As claimants possessed no power to convene hearings, it is unfair and irrational to punish them for the Commission's failure to do so." *Id.* at 443-44.

Despite the unanimous and enduring *Logan* precedent, petitioner's argument simply reiterates Zimmerman Brush's defense of decades ago. FedEx demands default of the employee's claim if the EEOC does not carry out its statutory duties of notice and informal resolution. *See* Petitioner's Brief at 9 (ADEA "requires dismissal of any lawsuit" if the EEOC does not give notice to the employer and initiate informal resolution); 12 (respondent's charge was invalid because "[t]he EEOC did not assign the questionnaire a charge number . . . did not notify FedEx of [the] allegations . . . [a]nd did not commence an investigation or efforts to resolve" the claims).

FedEx's argument fails under the reasoning of *Logan*. There is no evidence in the record that Ms. Kennedy knew or should have known that the EEOC failed to docket her charge or take action on it. Even if she had known, the employee has no means to compel the EEOC to take action on a charge. *See Smith v. Casellas*, 119 F.3d 33, 34 (D.C. Cir. 1997) ("Congress has not authorized, either expressly or impliedly, a cause of action against the EEOC for the EEOC's alleged negligence or other malfeasance in processing an employment discrimination charge"); *Scheerer v. Rose State Coll.*, 950 F.2d 661, 663 (10th Cir. 1991) ("[t]he circuits which have addressed the issue have uniformly held that no cause of action against the EEOC exists for challenges to its processing of a claim").

As the Tenth Circuit noted earlier this month, in holding that an Intake Questionnaire may serve as a Title VII charge:

> If we were to make notice to the employer a determining factor for exhaustion, the plaintiff would bear the burden of the EEOC's failure in handling a

> charge. But it is the EEOC's, not the plaintiff's, duty to provide the charged party with notice within ten days after a charge is filed, *see* 29 C.F.R. §1601.14(a); a plaintiff should not be penalized for the EEOC's negligence in handling a charge.

*Jones v. United Parcel Service*, 2007 WL 2677141 at *6 (10th Cir. Sept. 13, 2007) (Tacha, C.J.). *See also* 29 C.F.R. § 1626.11 (under ADEA, "[u]pon receipt of a charge, the Commission shall promptly notify the respondent that a charge has been filed."); Memorandum dated February 21, 2002 from Elizabeth M. Thornton, Director /s/ OFFICE OF FIELD PROGRAMS TO "ALL DISTRICT, AREA, AND LOCAL OFFICE DIRECTORS" (published at http://www.eeoc.gov/charge/memo-2-21-02.html) ("In helping the Solicitor General's Office prepare for a Supreme Court argument, we learned that some field offices may not be consistently giving timely notice of charges received by mail. This memorandum re-emphasizes the importance of giving notice withing 10 days of receipt of a document that clearly constitutes a charge, even if we do not send a copy of the document itself.")

The experience of the Age Discrimination Claims Assistance Act of 1988 casts further doubt on FedEx's argument. In the 1980s, Congress found that the EEOC had fallen behind in the processing of ADEA charges. Pub. L. 100-283, Apr. 7, 1988, 102 Stat. 78, § 1. At that time, the limitations period for an ADEA case was two or three years, borrowed from the Fair Labor Standards Act (FLSA), 29 U.S.C. § 255(a). (Congress later amended this period in the Civil Rights Act of 1991 to allow an ADEA suit to be brought within 90 days of receipt of a right-to-sue letter from the EEOC, 29 U.S.C. § 626(e)). The EEOC's delay imperiled an undetermined number of ADEA claimants, whose charges languished while the two-to-three year clock ticked down (or in some instances, ran out). Pub. L. 100-283, Apr. 7, 1988, 102 Stat. 78, § 2 ("many persons who filed such charges with the Commission have lost the right to bring private civil actions

with respect to the unlawful practices alleged in such charges"). Instead of allowing employers to reap the benefit of the EEOC's systemic delays (with many claims irredeemably time-barred), Congress — at the urging of *amicus* AARP and others — extended or reactivated limitations periods on the then-pending or expired claims so that employees would have 180 additional days to file. *Id.*, § 3. It also required that the EEOC serve notice on the charging parties to inform them of their rights under this act. *Id.*, § 4.

Forfeiture of discrimination claims by inadvertence is a discredited concept under *Logan*. *See also Edelman v. Lynchburg College*, 535 U.S. 106, 115 (2002) (construing section 706 of Title VII to "ensure[] that the lay complainant, who may not know enough to verify [a charge] on filing, will not risk forfeiting his rights inadvertently"). *Logan* exposes the errors in FedEx's argument.

## II. FEDERAL LAW DOES NOT PLACE THE BURDEN OF EEOC COMPLIANCE ON THE EMPLOYEE

FedEx and its *amici* backers struggle to find a way to hold Ms. Kennedy comparatively negligent for the EEOC's inaction. Two arguments are advanced: that Ms Kennedy failed to "exhaust" administrative remedies, and that she failed to file a timely "charge" within the intent of section 7(d) of the ADEA. Neither finds support in the law or record. We first refute the exhaustion argument (EEAC *Amicus* Br. at 5-6, 8, 12, 14; Chamber of Commerce *Amicus* Br. at 4-5), and then show, in the next section, that Ms. Kennedy's Intake Questionnaire and affidavit constitute a complete ADEA charge.

Federal law nowhere mandates exhaustion of administrative remedies with the EEOC, at least for private-sector employees. *Woodford v. Ngo*, 126 S. Ct. 2378, 2390-91 (2006) (describing ADEA and Title VII procedures, noting that "[n]either of these provisions makes reference to the concept of exhaustion, and neither is in any sense an exhaustion provision"). The ADEA is especially clear on this point. Under section 7(d) the employee need only file the charge with

the Commission, then wait 60 days to file a civil action ("[n]o civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the [EEOC]"). An ADEA claimant may, but need not, wait until the charge "is dismissed or the proceedings of the Commission are otherwise terminated by the Commission" before filing a civil action (29 U.S.C § 626(e)). A federal sector employee under the ADEA need not even file a charge, but must only give the Commission "thirty days' notice of an intent to file such an action" before commencing a civil lawsuit. 29 U.S.C. § 633a(d). *See generally Stevens v. Department of Treasury*, 500 U.S. 1, 5-6 (1991).

Congress can, of course, draft remedial statutes that require administrative exhaustion as a precondition to suit. *See, e.g., Cutter v. Wilkinson*, 544 U.S. 709, 723 n.12 (2005) ("a prisoner may not sue under RLUIPA without first exhausting all available administrative remedies") *citing* 42 U.S.C. § 1997e(a) ("[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted"); *Schweiker v. Chilicky*, 487 U.S. 412, 424 (1988) (setting out administrative exhaustion rules for Social Security benefits under 42 U.S.C. § 421(a)); *Smith v. Robinson*, 468 U.S. 992, 1020 n.22 (1984) (referring to exhaustion of administrative remedies under section 504 of the Education of the Handicapped Act). But it did not do so here — other than the minimal requirement that a charge be filed.

Courts have also, now and then, inferred administrative exhaustion requirements. Even then, "[o]f 'paramount importance' to any exhaustion inquiry is congressional intent." *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) (*quoting Patsy v. Board of Regents*, 457 U.S. 496, 518 (1982)). "[C]ourts are guided by congressional intent in determining whether application of the [administrative exhaustion] doctrine would be consistent with the statutory scheme." *Patsy*, 457 U.S. at 502 n.4. As this Court found in *Woodford*, Congress did

not intend to have exhaustion requirements imposed beyond those spelled out in the employment discrimination statutes.

The only hint of exhaustion under the ADEA involves actions by the Commission itself in its own enforcement capacity: before it may institute an lawsuit, the EEOC under section 7(b) "shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion." 29 U.S.C. § 626(b). This does not bear on Ms. Kennedy, who commenced her own civil action.

The ADEA does not even call for employees to serve notice of the charge on the employer. Section 7(d) of the ADEA confers that duty on the EEOC. Federal employees, instead of filing a charge, may instead file a notice of intent to sue on the Commission and by-pass the administrative procedure (29 U.S.C. § 633a(d)). Even then, the Commission is charged with "promptly notify[ing] all persons named therein as prospective defendants in the action." This is not a situation, such as under the Resource Conservation and Recovery Act, 42 U.S.C. § 6972, and numerous other federal statutes, where Congress charges the aggrieved party with notifying the other side of the intent to sue. *See, e.g., Hallstrom v. Tillamook Co*, 493 U.S. 20, 23 (1989) (citing statutes with similar notification requirements).

In sum, any argument based on a theory of administrative exhaustion is ill-founded and wholly unsupported by a close reading of the statute or relevant case law. For completeness sake, the result would be no different if this case arose under Title VII, though the analysis would differ slightly. Section 706(e) of Title VII, 42 U.S.C. § 2000e-5(e), as interpreted by this Court, requires that a complainant who "initially institutes proceedings with a state or local agency with authority to grant or seek relief from the practice charged" must "file a charge" with that agency, or "have the EEOC refer the charge to that agency, within 240 days of the alleged discriminatory event...." *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 110-111 (1988). The Commission then has

a specified ten days to serve notice, and an obligation to investigate, under section 706(b), 42 U.S.C. § 2000e-5(b). After 180 days, if the Commission (or Attorney General) has not filed a civil action, dismissed the charge or entered into a conciliation agreement, it may then serve notice on the claimant (known as a "right-to-sue" letter) who may within 90 days file a civil action under section 706(f)(1), 42 U.S.C. § 2000e-5(f)(1). Receipt of the notice, though a precondition to suit, does not require proceedings before the EEOC and may be requested by the employee before the Commission even begins its investigation. 29 C.F.R. § 1601.28(a). As with the ADEA, it is the EEOC, not the employee, that has the obligation to take these actions. Except for federal employees,[5/] both Title VII and the Americans with Disabilities Act (ADA) (the latter governed by Title VII enforcement standards, 42 U.S.C. § 12117) impose no exhaustion requirement. *See, e.g., Doe v. Oberweis Dairy*, 456 F.3d 704, 710 (7th Cir. 2006) (Posner, J.) ("Title VII does not incorporate anything like the full apparatus of exhaustion, an apparatus designed as we have noted for cases in which judicial review of an adjudication or a rule is sought").

## III. CONTROLLING EEOC REGULATIONS SPELL OUT WHAT IS REQUIRED TO APPEAR IN A CHARGE

The term "charge" is not defined in the ADEA or Title VII. *Edelman v. Lynchburg College*, 535 U.S. 106, 112 (2002) (neither section 706(b) nor section 706(e)(1) of Title VII "defines 'charge,' which is likewise undefined elsewhere in the statute"). In the absence of a statutory definition, it is within the EEOC's discretionary authority to adopt regulations

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[5/] Title VII apples to federal employment by way of section 717, 42 U.S.C. § 2000e-16. Federal employees file their complaints directly with the agency that employs them, rather than with the EEOC. 42 U.S.C. § 2000e-16(c). Section 717(b) provides an administrative mechanism, while section 717(c) allows a claimant to file a civil action in federal district court, though only after exhausting administrative remedies. *See generally Loeffler v. Frank*, 486 U.S. 549, 559 (1988).

construing that term, whether the regulations be deemed procedural (under Title VII, 42 U.S.C. 2000e-12(a))[6] or substantive (under the ADA or the ADEA).[7] Ms. Kennedy followed the applicable regulation, 29 C.F.R. § 1626.6, and FedEx does not dispute its validity. Petitioner's Br. at, 3-4, citing the regulation).

Regarding ADEA claims, the EEOC (at 29 C.F.R.§ 1626.6) requires only that a "charge shall be in writing and shall name the prospective respondent and shall generally allege the discriminatory act(s). Charges received in person or by telephone shall be reduced to writing."[8] 29 C.F.R. § 1626.8(a) recommends other items that "should" appear in an ADEA charge,[9] but clarifies in subsection (b) that

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[6] Under Title VII, the EEOC may "issue, amend, or rescind suitable procedural regulations to carry out the provisions of [Title VII]. Regulations issued under this section shall be in conformity with the standards and limitations of" the Administrative Procedure Act. 42 U.S.C. § 2000e-12(a).

[7] The ADA states that "Not later than 1 year after [the date of enactment of this Act], the Commission shall issue regulations in an accessible format to carry out this subchapter in accordance with subchapter II of chapter 5 of title 5." 42 U.S.C § 12116. Section 9 of the ADEA provides that "[i]n accordance with the provisions of subchapter II of chapter 5 of Title 5, the [EEOC] may issue such rules and regulations as it may consider necessary or appropriate for carrying out this chapter . . . ." 29 U.S.C. § 628. Neither section is limited to procedural rules.

[8] *See also* 29 C.F.R. § 1626.3 (a "charge shall mean a statement filed with the Commission by or on behalf of an aggrieved person which alleges that the named prospective defendant has engaged in or is about to engage in actions in violation of the Act").

[9] Subsection (a) of that regulation provides:

> (a) In addition to the requirements of Sec. 1626.6,

"[n]otwithstanding the provisions of paragraph (a) of this section, a charge is sufficient when the Commission receives

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each charge should contain the following:

> (1) The full name, address and telephone number of the person making the charge;
>
> (2) The full name and address of the person against whom the charge is made;
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> (3) A clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices;
>
> (4) If known, the approximate number of employees of the prospective defendant employer or members of the prospective defendant labor organization.
>
> (5) A statement disclosing whether proceedings involving the alleged unlawful employment practice have been commenced before a State agency charged with the enforcement of fair employment
>
> practice laws and, if so, the date of such commencement and the name of the agency.

A Title VII or ADA charge need likewise furnish only minimal information to invoke the administrative process. 29 C.F.R. § 1626.8(b) ("a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of"). The only significant difference between the ADEA and Title VII regimes is that Title VII and ADA charges must be verified. 42 U.S.C. § 2000e-5(b); 29 C.F.R. § 1601.12(b).

from the person making the charge either a written statement or information reduced to writing by the Commission that conforms to the requirements of Sec. 1626.6." FedEx nowhere disputes that Ms. Kennedy's submission to the EEOC was in writing and otherwise satisfied the conditions to constitute a valid charge (JA265-74).

Were there any doubt at all in the matter, the EEOC's regulations defining a charge warrant this Court's *Chevron* deference (*Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984)). As the Court found in *Chevron USA Inc. v. Echazabal*, 536 U.S. 73 (2002), a reasonable EEOC regulation promulgated within the agency's rule-making authority ought to be enforced. Reviewing an ADA regulation defining the "direct threat" defense, the Court unanimously held that "the EEOC's resolution exemplifies the substantive choices that agencies are expected to make when Congress leaves the intersection of competing objectives both imprecisely marked but subject to the administrative leeway found in 42 U.S.C. § 12113(a)." *Id.* at 85.

More specifically, this Court in *Edelman v. Lynchburg College*, 535 U.S. 106 (2002), reviewed the Title VII charge-filing requirements and affirmed a rule allowing charging parties to verify charges by amendment, with the amendment relating back to the original charge. Three concurring justices in *Edelman* would have deferred outright to the EEOC's procedural regulation (29 C.F.R. § 1601.12(b)). *Edelman*, 535 U.S. at 119 (Thomas, J., concurring) and 120-21 (O'Connor, J., with whom Scalia, J., concurs in the judgment). The majority signaled their approval of the rule, without specifically addressing the issue of agency deference. *Id.* at 114.

Like the "direct threat" regulation considered in *Echazabal* and the verification requirement reviewed in *Edelman*, the EEOC's regulations about the content of a charge — a gap Congress left to be filled by the agency — reflect a balancing between the employer's interest in knowing the dimension of the claim and the employee's often straitened access to evidence in the early stages of a discrimination case. *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 512 (2002)

("[b]efore discovery has unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required prima facie case in a particular case").

Of course, most employees will include sufficient detail in their charge to inform employers of the outlines of their claim. Many *pro se* employees receive assistance from intake officers who help draft the charges and are presumably mindful of the kinds of facts that the Commission needs to complete an investigation. Employees represented by counsel in the charging process, meanwhile, will be even more expansive because plaintiffs' attorneys know that federal courts often dismiss civil actions that are not supported by facts appearing in the charge. B. LINDEMANN AND P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, ch. 28, 1894-1901 (4th ed. 2007) (setting forth extensive U.S. Court of Appeals authority evaluating whether an employee's claims are like or reasonably related to the contents of the EEOC charge). Few charges in the real world are likely to resemble the minimalist model suggested in the regulations. (Observe Ms. Kennedy's charge, for instance, which provided unstinting detail about her claims.)

FedEx must therefore resort to a back-up argument, against the grain of the regulation, that Ms. Kennedy "could not have reasonably believed that her intake questionnaire would be treated or sufficed as a charge" (Petitioner's Br. at 27). Even if such a state-of-mind requirement exists — and none is suggested by the statutes or regulations (see the next section) — the evidence in the Joint Appendix (JA265-74) does not support the petitioner. The Intake Questionnaire Form 283 (JA265) nowhere warns that it is not a charge or that it may not be used to initiate a claim. Indeed, the employee checked off that she consented to her name being "disclosed to the organization which allegedly discriminated against you." The Privacy Act disclaimer on the reverse side states that "[i]nformation provided on this form may be disclosed to other State, local and federal agencies as may be appropriate or necessary to carrying out the Commissions's functions," suggesting strongly that filing this paper does initiate an investigation. The only hint that this document may not be a

charge by itself is the disclosure (in the same paragraph) that Form 283 is used for "pre-charge filing counseling as is appropriate." The reference is so obscure that only a lawyer steeped in anti-discrimination law could be expected to spot it.

FedEx infers (incorrectly) that Ms. Kennedy received assistance from an attorney (Petitioner's Br. at 27),[10/] yet this point is irrelevant. The Court's ordinary standard of construction which assumes the norm of a *pro se* charge. In *Love v. Pullman Co.*, 404 U.S. 522 (1972), this Court eschewed a narrow, technical construction of the charge-filing requirement as "particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Id.* at 527. *See also Edelman*, 535 U.S. at 115 (construing Title VII charge-filing rule from the perspective of "the lay complainant, who may not know enough to verify [a charge] on filing, will not risk forfeiting his rights inadvertently"); *Hallstrom*, 493 U.S. at 28 ("the initial charge in a Title VII proceeding is normally filed by an aggrieved individual"); *Commercial Office Products Co.*, 486 U.S. at 124 (Title VII has a "remedial scheme in which laypersons, rather than lawyers, are expected to initiate the process"); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 397 (1982) (avoiding "technical reading" of the charge-filing rule).

## IV. THE COURT SHOULD REJECT THE "MANIFEST INTENT" STANDARD INTERPOSED BY THE LOWER COURTS

The Second Circuit applied what it called a "manifest intent" test to determine whether Ms. Kennedy intended to invoke the EEOC's investigatory machinery. *Holowecki v.*

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[10/] To the contrary, the Intake Questionnaire appears to have been produced originally without assistance of counsel. On the form, Ms. Kennedy checked that she had not "sought the assistance about the action" from an attorney (JA265). As further evidence that she prepared the Intake Questionnaire without assistance of counsel, Ms. Kennedy lists FedEx as having approximately "100" employees, an error that an attorney would be far less likely to make.

*Federal Exp. Corp.*, 440 F.3d 558, 566 (2d Cir. 2006). However, the court below acknowledged that the "manifest intent" requirement does not originate from the statute or regulations, but is simply interposed by the courts. "Some Circuits have imposed an additional requirement, the 'manifest intent' rule, that is not explicitly stated in the statute or interpreting regulations." *Id.* at 566-67. Yet Congress entrusted the EEOC — not the judiciary — with authority to decide what ought to be contained in documents that initiate an investigation before it. The "manifest intent" test, a judicial postscript to the regulations, should not be adopted here. The judiciary's role is to enforce the agencies' duly-authorized regulations, not to improve upon them. *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001) ("[w]hen Congress has 'explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation,' *Chevron*, 467 U.S., at 843-844, 104 S. Ct. 2778, and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute"). If a claimant's charge meets the Commission's regulatory minima, then no more may be required.

## CONCLUSION

For the above stated reasons, the *amici* respectfully request that the Court affirm the Court of Appeals and remand for further proceedings.

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Respectfully submitted,

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